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10 | *Attorneys for Petitioner*
11 GOOGLE INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

16 GOOGLE INC.,
17 Petitioner,
18 v.
19 ORRICK, HERRINGTON & SUTCLIFFE
20 LLP,
21 Respondent.

CASE NO.: 15-mc-80208
CASE IN OTHER COURT:
No. 3:14-cv-00981-HTW-LRA (S.D.
Miss.)

**DECLARATION OF MICHAEL H.
RUBIN IN SUPPORT OF GOOGLE
INC.'S MOTION TO COMPEL
COMPLIANCE WITH SUBPOENA**

Date: TBD
Time: TBD
Judge: TBD

1 I, MICHAEL H. RUBIN, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

2 1. I am a partner with the law firm Wilson Sonsini Goodrich & Rosati, attorneys for
3 Petitioner Google Inc. (“Google”). I submit this affidavit in support of Google’s Federal Rule of
4 Civil Procedure 45 Motion to Compel Compliance with Subpoena. The following facts are true of
5 my personal knowledge and if called and sworn as a witness I could competently testify to them.

6 2. Along with others at my firm, I have been involved with Google’s efforts to obtain
7 discovery from third parties to support its claims against Mississippi Attorney General Jim Hood
8 (“AG Hood”) in *Google Inc. v. Hood* (3:14-cv-00981-HTW-LRA, S.D. Miss.) (“*Google Inc. v.*
9 *Hood*”). To date, Google has served eight similar subpoenas on third parties:

- 10 a. A March 12, 2015 subpoena served on the law firm of Jenner & Block (“Jenner”).
- 11 b. A March 12, 2015 subpoena served on the Motion Picture Association of America,
12 Inc. (“MPAA”).
- 13 c. A March 12, 2015 subpoena served on Twenty-First Century Fox, Inc. (“Fox”).
- 14 d. A March 12, 2015 subpoena served on Viacom, Inc. (“Viacom”).
- 15 e. A March 12, 2015 subpoena served on NBCUniversal Media, LLC (“NBC”).
- 16 f. A March 12, 2015 subpoena served on the Digital Citizens’ Alliance (“DCA”).
- 17 g. A May 12, 2015, subpoena served on the Recording Industry Association of Amer-
18 ica (“RIAA”).
- 19 h. A May 21, 2015 subpoena served on the law firm of Orrick, Herrington & Sutcliffe
20 LLP (“Orrick”) that set a compliance date of June 8, 2015, a true and correct copy
21 of which is attached hereto as Exhibit 1.

22 3. These subpoenas were served on Jenner, the MPAA, the DCA, and the RIAA in the
23 District of the District of Columbia, on Fox, Viacom, and NBC in the Southern District of New
24 York, and on Orrick in this district.

25 4. The subpoenas served on Jenner, the MPAA, the DCA, and Orrick are each virtual-
26 ly identical. The subpoenas served on Fox, Viacom, NBC, and the RIAA are also each virtually
27 identical, although they are more narrow than the subpoenas served on the MPAA, Jenner, the
28 DCA, and Orrick.

1 5. In response to Google's subpoenas, the subpoenaed parties, including Orrick, have
2 all asserted similar, and in most cases identical objections. They have all asserted the same rele-
3 vance objection regarding their internal documents and communications with parties other than
4 AG Hood, and they have made similar privilege claims over materials not shared with AG Hood.
5 Other than Orrick, each subpoenaed party agreed to produce its communications with AG Hood,
6 subject to requests for protective orders and other objections. Ultimately, however, each of them
7 produced those documents without a protective order having been entered. And in each case, re-
8 view of their limited productions have identified deficiencies.

9 6. After repeated efforts to convince the subpoenaed parties to withdraw those objec-
10 tions and produce the documents requested by Google's subpoenas, including extensive corre-
11 spondence and meet-and-confers with each party, the parties remained at an impasse.

12 7. On June 1, 2015, Google brought Motions to Compel against Jenner, the MPAA,
13 and the DCA in the District of the District of Columbia. On the same day, Google brought Mo-
14 tions to Compel against Fox, Viacom, and NBC in the Southern District of New York.

15 8. Only after Google filed these motions did these parties produce any documents. It
16 was in the weeks following the filings that they began producing their communications with AG
17 Hood. They indicated that they were not withholding any communications with AG Hood on the
18 grounds of privilege.

19 9. Within days of filing the motions to compel, on June 4, 2015, Google brought Rule
20 45(f) Motions to Transfer its Motions to Compel to the court in Mississippi against the six parties
21 in the District of the District of Columbia and the Southern District of New York.

22 10. The court in the Southern District of New York held a hearing on July 29, 2015 re-
23 garding the Motion to Compel and the Rule 45(f) Motion to Transfer. At the hearing, the court
24 granted Google's Rule 45(f) Motion to Transfer.

25 a. A true and correct copy of the transcript of the July 29, 2015 hearing is attached
26 hereto as Exhibit 2.

27 b. A true and correct copy of the court's July 29, 2015 written order granting
28 Google's Rule 45(f) Motion to Transfer is attached hereto as Exhibit 3.

1 11. The court in the District of Columbia held a hearing on July 8, 2015
 2 regarding Google's Rule 45(f) Motion to Transfer. On July 31, 2015, the court granted that motion.

3 a. A true and correct copy of the court's July 31, 2015 order granting transfer is at-
 4 tached hereto as Exhibit 4.

5 b. A true and correct copy of the court's July 31, 2015 memorandum opinion in sup-
 6 port of the order is attached hereto as Exhibit 5.

7

8 **Orrick's Subpoena Objections and the Meet and Confer Process**

9 11. On June 5, 2015, my partner, David Kramer, received an email from William Al-
 10 derman, counsel for Orrick, requesting an extension of the compliance date to June 15, 2015. We
 11 told Mr. Alderman that there was a limited discovery window in the underlying case, but as a ges-
 12 ture of good faith we extended the compliance date of the subpoena to June 15, 2015. A true and
 13 correct copy of the June 5 email exchange with William Alderman of Orrick is attached hereto as
 14 Exhibit 6.

15 12. On June 15, 2015, Mr. Kramer received a letter setting out Orrick's objections to
 16 the subpoena. In the cover email that accompanied this letter, Mr. Alderman indicated that, pursu-
 17 ant to the objections, Orrick would not be producing any documents in response to the subpoena.
 18 A true and correct copy of the cover email and objections from Mr. Alderman is attached hereto as
 19 Exhibit 7.

20 13. On June 26, 2015, I met and conferred with Mr. Alderman by phone regarding Or-
 21 rick's objections to the May 21 subpoena served by Google. Among the positions he took on that
 22 call were that anything sent to AG Hood by Orrick was done at AG Hood's request and was there-
 23 fore protected by law enforcement and common interest protections, though he said he would re-
 24 confirm that this was in fact Orrick's position. Mr. Alderman said that the common interest at is-
 25 sue was the common interest in accommodating AG Hood's request. He did not identify any antic-
 26 ipated litigation to support Orrick's assertion of work product privilege, and he confirmed that Or-
 27 rick had no attorney client relationship with AG Hood. In response to questions about the burden
 28 faced by Orrick, Mr. Alderman said he would get back to me with the total number documents

1 identified by Orrick's initial search. Mr. Alderman also confirmed that Orrick would not be pro-
2 ducing any documents in response to the subpoena. Mr. Alderman said he would follow up with
3 the number of documents and Orrick's position regarding its communications with AG Hood by
4 the next business day, June 29, 2015.

5 14. Mr. Alderman in fact responded by email on July 2, 2015. He stated that Orrick's
6 preliminary search had identified some 18,000 documents. He also confirmed that Orrick was
7 standing by its position that all of its communications with AG Hood were in response to requests
8 from AG Hood and his office and were therefore privileged. A true and correct copy of Mr. Al-
9 derman's July 2, 2015 email is attached hereto as Exhibit 8.

10 15. On July 13, 2015, I responded via letter to Mr. Alderman. My letter urged Orrick to
11 reconsider its positions on privilege, particularly in light of the fact that all of the other subpoe-
12 naed parties recognized that there was no privilege applicable to their communications with AG
13 Hood. My letter also asked Orrick to provide the list of custodians and search terms it had used to
14 arrive at the number of documents it had mentioned, and it urged Orrick to produce documents
15 requested by the subpoena without delay. I asked for a response to my letter by July 17, 2015. A
16 true and correct copy of my July 13, 2015 letter is attached hereto as Exhibit 9.

17 16. On July 21, 2015, Mr. Alderman responded by email, saying that he had been out
18 of the office the previous week and he hoped to respond to our letter the next day. Orrick has nev-
19 er responded to my July 13 letter. A true and correct copy of Mr. Alderman's July 21, 2015 email
20 is attached hereto as Exhibit 10.

21 17. On July 31, 2015, I sent Mr. Alderman a letter explaining that because of Orrick's
22 continued pattern of delay, its refusal to substantiate its positions or produce any documents, and
23 the looming discovery deadline in the case, Google would be bringing a Motion to Compel. I also
24 informed him that Google would be bringing a Rule 45(f) Motion to Transfer, and that if I did not
25 hear back from him by noon on August 3, 2015, Google would assume Orrick intended to oppose
26 that motion. A true and correct copy of my July 31, 2015 letter is attached hereto as Exhibit 11.

27 18. On August 3, 2015, I spoke with Mr. Alderman by phone. He asked that Google
28 not file its Rule 45(f) Motion to Transfer concurrently with its Motion to Compel, but instead

1 bring the Motion to Transfer a few days later. During that time Mr. Alderman said Orrick would
 2 review the case law and decisions of the courts in New York and the District of Columbia and de-
 3 cide whether it would oppose the motion. He also said that he would accept electronic service of
 4 Google's Motion to Compel papers.

5

6 **Productions by Other Subpoenaed Parties and Attorney General Hood**

7 19. On June 12, 2015, Jenner produced 295 documents to Google in response to
 8 Google's subpoena.

9 20. During the meet and confer process, Jenner stated that it would not produce docu-
 10 ments without a protective order being in place. Google was clear that it would not agree to a pro-
 11 tective order absent a showing that one was called for, and Jenner did not make that showing.
 12 Even though no protective order had issued, Jenner produced a small set of documents. In connec-
 13 tion with its production, Jenner purported to impose conditions on the use of the documents, in-
 14 cluding by labeling them "confidential." I advised Jenner counsel that, as I had told them during
 15 the parties' meet-and-confer, Google had not agreed to be bound by those conditions and would
 16 not abide by them. I received no response to that communication.

17 21. Jenner's June 12 production is Bates Numbered JB_00000001 through
 18 JB_00000629. These documents consist of email communications that included AG Hood or his
 19 staff and a Jenner custodian, as well as documents attached to those emails (some of which Jenner
 20 says it withheld at the request of AG Hood).

21 a. Attached hereto as Exhibit 12 is a true and correct copy of a January 15, 2014 email
 22 exchange between Brian Moran of Orrick, Rob McKenna of Orrick, Mary Jo
 23 Woods of AG Hood's office, Blake Bee of AG Hood's office, and others that was
 24 produced by Jenner and Bates Numbered JB_00000546-547.

25 b. Attached hereto as Exhibit 13 is a true and correct copy of a June 4, 2014 email ex-
 26 change between Rob McKenna, AG Hood, Brian Moran, and Thomas Perrelli of
 27 the MPAA that was produced by Jenner and Bates Numbered JB_00000400-401.

28

1 c. Attached hereto as Exhibit 14 is a true and correct copy of a January 16-17, 2014
2 email exchange between Rob McKenna, AG Hood, Brian Moran, Thomas Perrelli,
3 and others that was produced by Jenner and Bates Numbered JB_00000014-16.

4 d. Attached hereto as Exhibit 15 is a true and correct copy of a January 15, 2014 email
5 exchange between Rob McKenna, AG Hood, Brian Moran, Thomas Perrelli, and
6 others that was produced by Jenner and Bates Numbered JB_00000555-557.

7 e. Attached hereto as Exhibit 16 is a true and correct copy of a June 4, 2014 email ex-
8 change between Rob McKenna, AG Hood, and Thomas Perrelli that was produced
9 by Jenner and Bates Numbered JB_00000399.

10 f. Attached hereto as Exhibit 17 is a true and correct copy of a February 21, 2014
11 email exchange between Mary Jo Woods, Rob McKenna, Brian Moran, and others
12 that was produced by Jenner and Bates Numbered JB_00000333-334.

13 g. Attached hereto as Exhibit 18 is a true and correct copy of a March 8, 2014 email
14 exchange between Rick Smotkin of Comcast, Rob McKenna, Brian Moran, and
15 others that was produced by Jenner and Bates Numbered JB_00000390-391.

16 h. Attached hereto as Exhibit 19 is a true and correct copy of a September 29, 2014
17 email exchange between Angie Cossitt of the Mike Moore Law Firm, Thomas Per-
18 relli, Brian Moran, Mary Jo Woods, Blake Bee, and others that was produced by
19 Jenner and Bates Numbered JB_00000457.

20 22. On June 22, 2015, the MPAA produced documents in response to Google's sub-
21 poena.

22 23. In a June 15, 2015 message in which the MPAA indicated that it was prepared to
23 produce a limited set of documents, it expressly made the production contingent upon Google's
24 agreement to "treat such documents as Confidential pending the resolution of Google's motion to
25 compel and MPAA's request for a protective order in this matter," such that the documents "not
26 be disclosed publicly or used in any respect for any purpose outside of this litigation." Google
27 agreed to keep the documents confidential.

1 24. After reviewing the production, Google told the MPAA that it did not believe the
2 documents were entitled to confidential treatment. The MPAA has subsequently withdrawn its re-
3 quest for confidential treatment over nearly all of the documents, including all documents attached
4 to this declaration.

5 25. The MPAA's June 22 production is Bates Numbered MPAA00000001 through
6 MPAA00003095. These documents consist of email communications that included AG Hood or
7 his staff and a MPAA custodian, as well as documents attached to those emails (some of which the
8 MPAA says it withheld at the request of AG Hood).

- 9 a. Attached hereto as Exhibit 20 is a true and correct copy of a January 20, 2014 email
10 exchange between AG Hood, Vans Stevenson of the MPAA, Rob McKenna, and
11 others that was produced by the MPAA and Bates Numbered MPAA00001998.
- 12 b. Attached hereto as Exhibit 21 is a true and correct copy of a November 25, 2013
13 email exchange between AG Hood and Brian Cohen of the MPAA attaching an in-
14 vitation for a fundraising dinner for AG Hood that was produced by the MPAA and
15 Bates Numbered MPAA00001576-1577.

16 26. Starting in April of 2015 and continuing on a rolling basis, AG Hood has produced
17 documents in response to Google's discovery requests.

18 27. AG Hood's production is Bates Numbered D000001 through D001657. These doc-
19 uments consist of email communications that included AG Hood or his staff and various third par-
20 ties, as well as documents attached to those emails.

- 21 a. Attached hereto as Exhibit 22 is a true and correct copy of the privilege log accom-
22 panying AG Hood's April 15, 2015 production.
- 23 b. Attached hereto as Exhibit 23 is a true and correct copy of the privilege log accom-
24 panying AG Hood's April 28, 2015 production.
- 25 c. Attached hereto as Exhibit 24 is a true and correct copy of a March 27, 2013 email
26 exchange and attachments between Meredith Aldridge of AG Hood's office, Blake
27 Bee, and Brian Cohen of the MPAA that was produced by AG Hood and Bates
28 Numbered D000904-908.

1 d. Attached hereto as Exhibit 25 is a true and correct copy of a June 22 to July 9, 2013
2 email exchange between Rob McKenna of Orrick, Jack Evans and John Kelly of
3 Microsoft, AG Hood, and others that was produced by AG Hood and Bates Numbered
4 D001319-1323.

5 e. Attached hereto as Exhibit 26 is a true and correct copy of an August 17-20, 2013
6 email exchange between Rob McKenna, AG Hood, Melanie Webb of AG Hood's
7 office and others that was produced by AG Hood and Bates Numbered D001641-
8 1645.

9 f. Attached hereto as Exhibit 27 is a true and correct copy of a January 20, 2014 email
10 exchange between Rob McKenna, AG Hood, and others that was produced by AG
11 Hood and Bates Numbered D001338-1339.

12 g. Attached hereto as Exhibit 28 is a true and correct copy of an October 24, 2013
13 email exchange between Vans Stevenson and AG Hood that was produced by AG
14 Hood and Bates Numbered D000069.

15 h. Attached hereto as Exhibit 29 is a true and correct copy of a September 17, 2013
16 email exchange between Vans Stevenson and numerous people that was produced
17 by AG Hood and Bates Numbered D000081-85.

18

19 **Authentication of Other Exhibits**

20 28. Attached hereto as Exhibit 30 is a true and correct copy of Judge Wingate's March
21 2, 2015 Order granting Google's Motion for Temporary Restraining Order and granting Google's
22 Motion for Preliminary Injunction in *Google Inc. v. Hood*.

23 29. Attached hereto as Exhibit 31 is a true and correct copy of Judge Wingate's March
24 27, 2015 Order denying AG Hood's Motion to Dismiss and granting Google's Motion for Tempo-
25 rary Restraining Order and Preliminary Injunction in *Google Inc. v. Hood*.

26 30. Attached hereto as Exhibit 32 is a true and correct copy of Judge Wingate's April
27 10, 2015 Order on *Ore Tenus* Discovery Motion in *Google Inc. v. Hood*.

1 31. Attached hereto as Exhibit 33 is a true and correct copy of the transcript containing
2 AG Hood's remarks from the June 2013 meeting of the National Association of Attorneys General.

* * *

4 Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true
5 and correct. Executed on August 3, 2015 in San Francisco, California.

By: /s/ Michael H. Rubin
Michael H. Rubin